FOR ARGUMENT

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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1978

No. 77-6949

ROBERT DUNN, Petitioner,

v.

UNITED STATES OF AMERICA, Respondent.

REPLY BRIEF FOR THE PETITIONER

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ARGUMENT

I

THE SEPTEMBER 30 "CANGES STATEMENT" WAS NOT MADE IN A PROCEEDING ANCILLARY TO A COURT.

The U. S. Tenth Circuit Court of Appeals agreed with Dunn's contention that the "Canges Statement" was not made in a proceeding ancillary to a U. S. court or grand jury under 18 U.S.C. §1623. It ruled as follows:

> "This court has concluded that while the Canges statement is 'ancillary,' in the sense that it is connected to and had an effect upon the grand jury proceeding, the event occurring in Canges' office, in and of itself, is not a 'proceeding' within the meaning of the statute so as to be a proceeding ancillary to a grand jury proceeding. Despite the administration of the oath and presence of the notary public, we hold that the event lacks the degree of formality the statute requires." (A. 75) (Emphasis added.)

Respondent has taken issue with this finding and argues as follows:

> "Section 1623 does not define the term 'proceeding * * * ancillary to any court,' but the legislative history of the statute suggests that the term was included in the statute to bring within the reach of the statute statements such as affidavits, depositions, and certificates prepared for use in conjunction with a court proceeding. The September 30 proceeding clearly fit within the description. Petitioner's statement was taken in connection with the criminal proceeding against Musgrave and for use in that proceeding, a use in which petitioner actively participated by testifying at the October 21 evidentiary hearing and reaffirming the truth of his sworn statement. Accordingly, petitioner's September 30 statement was made in a proceeding ancillary to a court."

(Emphasis added.) (Brief for United States, p. 13-14).

Petitioner agrees that the legislative history suggests that a deposition falls within the purview of an ancillary proceeding under §1623 but disagrees that an affidavit or certificate by itself qualifies. Furthermore, Respondent asks this Court to find ancillariness by looking to the October 21st hearing, a proceeding not charged in the indictment.

Respondent argues that the legislative history of §1623 supports its conclusion that affidavits and certificates are included within the definition of ancillary proceedings before a U. S. court or grand jury. In support, it cites a letter from the Justice Department expressing concern that the draft of proposed Section 1623 excluded from its provisions pre-trial depositions, affidavits, and certificates, as well as, administrative and legislative hearings or proceedings. Senate Hearings on S.30, 91st Cong., 1st Sess. at 372, 379-380. Senator McClellan responded as follows:

> "You also read Title IV not to cover 'pre-trial depositions, affidavits and certifications.' This was not our intent in drafting the bill. We had hoped that it would be applicable, for example, to situations such as [the] kind of pre-trial depositions that the enforcement of S.1861 would present. If we included in the statute the phrase 'proceedings before or ancillary to any court or grand jury' do you feel that this intent would be adequately expressed?" (Emphasis added.) Senate Hearings at 409.

Respondent has concluded that Senator McClellan's response evidenced an intent to include "affidavits and certifications." (Brief for the United States, p. 26). Petitioner submits that a plain reading of the Senator's letter indicates an intent to include pre-trial depositions and nothing more. In a footnote Respondent further concludes that the Senator, in alluding to pre-trial depositions, must have been referring to "depositions for use in civil proceedings under 18 U.S.C. 1962, which was proposed as part of S.1861, 91st Cong., 1st Sess. (1969)." (Footnote, Brief for the United States, p. 25). It is also reasonable to assume that Senator McClellan was referring to the provision for pre-trial depositions in criminal cases which was part of S.30, the Organized Crime Control Act of 1970, P.L. 91-45, 84 Stat. 934. Senator McClellan introduced S.30 on January 14, 1969, and referred to his sponsorship in introducing S.1861. Vol. 115, Part 7, Congressional Record, p. 9566.

Under the Organized Crime Control Act, Congress created a procedure for taking pre-trial depositions of prospectively unavailable witnesses in pending federal criminal cases. Title 18, United States Code, Section 3503. The purpose of the new provision was to preserve testimony of a prospective witness whenever "due to exceptional circumstances it is in the interest of justice" that it be taken and preserved. 18 U.S.C. §3503(a). A deposition is to be taken only upon court order and the requesting party must give reasonable written notice of the time and

place of its taking. 18 U.S.C. §§3503(a) and (b). No motion was ever filed by attorney Canges or any other party to the Musgrave proceeding, no notice was given to the other parties, and no court order was entered authorizing a deposition.

Though §3503 modifies Rule 15 of the Federal Rules of Criminal Procedure, the new provision was intended to "reflect present practice under rule 15." U. S. Code Congr. and Admin. News, 91st Cong., 2nd Sess. 1970, Vol. 2, p. 4025. Under Rule 15, a "deposition may not be used if it was not taken pursuant to an order of the court and no notice was given to the parties." United States v. Polizzi, 500 F.2d 856, 891 (9th Cir. 1974) cert. den. 419 U.S. 1120; Mims v. Central Mfrs. Mnt. Ins., 178 F.2d 56, 59 (5th Cir. 1949).

Furthermore, Dunn's unavailability for trial or other proceedings was never demonstrated.[1] The document was not attested to be his statement (other than in later testimony), it was not reviewed and signed by him [See Rule 30(e), Federal Rules of Civil Procedure; Rogers v. Roth, 477 F.2d 1154, 1159 (10th Cir. 1973)], it was not recorded by other

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[1] "In order for a defendant to obtain a deposition, he must show each of the following:
(1) that it appears that a prospective witness may be unable to attend or prevented from attending the trial or hearing; (2) that the witness' testimony is material; and (3) that it is necessary to take his deposition 'in order to prevent a failure of justice.'" 8 Moore's Federal Practice 2d Ed., §15.02, p. 15-5 quoted in United States v. Massi, 277 F.Supp. 371, 373 (W.D. Ark. 1968).

than stenographic means with the approval of the court [See Rule 30(b)(4), Federal Rules of Civil Procedure], and it was not certified and filed with the court as required by Rule 30(f), Federal Rules of Civil Procedure.

When Dunn testified at the October 21st evidentiary hearing, even then, he had not reviewed the entire statement for accuracy.[2]

Plaintiff's Exhibit 2 was not a deposition at all but merely a purported transcription of a tape recording taken in Canges' office. (Plaintiff's Exhibit 2 and 3, R. Supp. Vol. I).[3] On voir dire examination, Mr. Cohen admitted

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[2] "Q Mr. Dunn, have you had occasion to review that certain transcript or affidavit of the conversation or colloquy that transpired on September 30th?

A Yes, sir, all but about the last five or ten pages." (A. 46).

[3] Q Now, sir, inviting your attention to September 30, 1976, did you at the request of Michael Canges have occasion to take a statement or affidavit from a man named Robert Dunn?

A Yes.

* * *

Q Was Mr. Dunn wearing a microphone the day you took it?

A That's correct.

Q Did you cause that later to be typewritten, put in typewritten form?

A Yes, I did.

Q And did you supervise that?

A Yes, I did.

Q Did you review the typewriting afterwards, and compare it to the tape recording?

A Yes.

Q Were there any changes, additions or deletions of stuff on the tape recording that you later put into

that he was not familiar with and had not followed federal deposition procedures for criminal cases.[4]

[footnote continued]

the affidavit?

A I don't understand your question.

Q Well, I'm sorry. That wasn't very clear. Did you change or delete anything when you transcribed it to writing?

A No.

Q Do you have the recording with you?

A Yes, I do.

MR. NOTTINGHAM: At this point, then, Your Honor, I would offer Exhibit 2, Plaintiff's Exhibit 2.

THE COURT: Your position, please?

MR. SEARS: I would ask for voir dire, Your Honor.

(R. Vol. II, p. 23-26).

[4]Cohen testified as follows:

Q Mr. Cohen, are you aware of the judicial qualifications established for court reporters by the United States Judicial Conference?

A Are you making reference to the Rules of Procedure?

Q I am relating specifically to the statement of judicial qualifications for certified court reports in federal courts, as promulgated by the United States Judicial Conference. Are you aware of such regulations?

A No, sir.

Q You are not? Have you ever received an appointment as an official court reporter for and by the United States District Court for the District of Colorado?

A No, sir.

Q Are you paid by the Judicial Conference of the United States?

A Directly, no. On occasion, yes.

Q Do you know the guidelines and requirements for the maintenance of record-keeping systems set down by the Judicial Conference of the United States?

A No.

Q Is your salary fixed by the Judicial Conference of the United States?

To assure the truthworthiness of a deponent's testimony, a defendant's right of confrontation must be preserved, the statements must be under oath and recorded, and the entire procedure must be under the authority and general supervision of the trial court. United States v. King, 552 F.2d 833, 840 (9th Cir. 1976) cert. den. 430 U.S. 966.

[footnote continued]

A No.

Q Are you aware of the statutory procedure for taking a deposition in a criminal case in federal courts under Title 18, United States Code, Section 3503?

A No.

Q Did you take the defendant before the Court and have him advised of his rights, as required under subsection (c) of Title 18, United States Code, Section 3503?

A No.

Q Did he have an attorney of his own choosing present when the statement before you was taken?

A May I review the transcript for a minute?

Q If you will, please.

A Would you repeat your question, please?

Q Did Mr. Dunn have an attorney of his own choosing present when the statement was taken before you?

A No, he did not.

Q You did not take him before the Court for appointment of counsel, is that correct?

A That's correct.

Q Did you give notice to any other parties to the pending case before the United States District Court for the District of Colorado of the taking of a statement from Mr. Dunn?

A No, sir.

Q Was there any indication made to you that Mr. Dunn would not be available for the Musgrave trial, or other exigent circumstances communicated which justified your taking of the statement outside of the court proceedings?

A No, sir.

(R. Vol. II, p. 26-28).

See California v. Green, 399 U.S. 149 (1970). Dunn was not represented by his own counsel who had an opportunity to cross-examine and he did not testify at the inconsistent declarations trial. "As amended, the section [3503] makes clear that the Government's right to obtain a deposition shall not infringe the defendant's rights under the fifth amendment." U. S. Code Congr. and Adm. News, 91st Cong., 2nd Sess., 1970, Vol. 2, p. 4026.

Had Dunn's statement been authorized and obtained pursuant to 18 U.S.C. §3503, it seems clear that its taking could be deemed to have occurred during an ancillary proceeding. The legislative history to the immunity provisions of the Organized Crime Control Act reads as follows:

> "Section 6002 contains the basic immunity from self-incrimination granting authorization. Proceedings before or ancillary to grand juries, courts, agencies of the United States, or before either House of Congress, Joint committees, committees or subcommittees thereof are covered. A pretrial deposition hearing for example, would be ancillary to a court proceeding. (See Senate Hearings at p. 409, 411.)" (Emphasis added.) U. S. Code Congr. and Adm. News, 91st Cong. 2nd Sess. 1970, Vol. II, p. 4017.

Respondent argues that the Krogh and Stassi cases support its contention that the Canges statement qualifies as an ancillary proceeding. United States v. Krogh, 366 F.Supp. 1255 (D.D.C. 1973); United States v. Stassi, 583 F.2d 122 (3rd Cir. 1978).

The bases for the court's ruling in Krogh that the "deposition" taken in the offices of the U. S. Department

of Justice was a proceeding ancillary to the Watergate Grand Jury is not set out in the opinion. Whether the Department of Justice followed §3503 procedures is not known. Nevertheless, the court seems to place great significance in the fact that Krogh, himself a lawyer with the advice of counsel, was aware of the nature of the proceedings and was "fully informed as to that fact in advance." Krogh at p. 1256. In Stassi, the affiant made certain declarations before the court in Rule 11 proceedings and subsequently declared matters inconsistent in an affidavit in support of a §2255 action. There is no question the Rule 11 statements were made before the court. The affidavit submitted with the 2255 motion poses a more difficult question. Affidavits in support of a habeas action are normally prepared for the court's preliminary determination as to whether an evidentiary hearing should be held. Dalli v. United States, 491 F.2d 758 (2nd Cir. 1974). It seems clear that §2255 proceedings themselves are to be considered proceedings before or ancillary to a U. S. court. However, where affidavits in support or opposition are not considered to be a part of the records of the case, it is questionable whether the court's ruling in Stassi that statements contained therein were declarations in an ancillary proceeding under §1623 is justified. Machibroda v. United States, 368 U.S. 487, 494-495 (1962); Crispo v. United States, 443 F.2d 13 (9th Cir. 1971). The affidavit alone is no substitute for testimony in establishing factual issues before the court. See Sciberras

v. United States, 404 F.2d 247 (10th Cir. 1968); Smith v. United States, 338 F.Supp. 1216 (D.C. Tenn. 1972); Close v. United States, 310 F.Supp. 240, 242 (D.C. Va. 1970).

Respondent further contends that the Canges statement would have been prosecutable under 18 U.S.C. §1621 "if the government had been able to prove that the contents of that statement were actually false rather than merely irreconcilably inconsistent with his grand jury testimony." (Brief for the United States, p. 22). It cites United States v. D'Amato, 507 F.2d 26, 29 (2nd Cir. 1974); United States v. Birrell, 470 F.2d 113 (2nd Cir. 1972); Ely Valley Mines, Inc. v. Lee, 385 F.2d 188 (9th Cir. 1967) and Butler v. McKey, 138 F.2d 373 (9th Cir. 1943) cert. den. 321 U.S. 780 (1944) in support of its contention that false swearing in an affidavit authorized to be filed in a judicial proceeding violates Section 1621. Whether the filing of a false affidavit or certificate is violative of §1621 is not determinative of whether the document qualifies as a proceeding before or ancillary to a court.

18 U.S.C. §1621, perjury generally, concerns false affidavits, certificates and declarations where a person has taken an oath before a competent tribunal, officer or person authorized by federal law to administer it. Section 1623, on the other hand, requires that false or inconsistent declarations be made in a "proceeding before or ancillary to any U. S. Court or grand jury." The language of §1623 is more restrictive than §1621. A false declaration under §1623 may be prosecuted under §1621, as well, but the

converse is not necessarily true. §1623 requires a proceeding before or ancillary to a U. S. court or grand jury; §1621 requires only that the matter be under oath before "a competent tribunal, officer or person." (Emphasis added.) Whether Dunn could be prosecuted under §1621 does not resolve the question of whether the requirements of §1623 were fulfilled.

The burden of proof for inconsistent declarations under §1623(c) is less substantial than proof of perjury under §1621. The traditional two-witness rule is not applied in §1623(c) prosecutions. United States v. Diggs, 560 F.2d 266 (7th Cir. 1977) cert. den. 434 U.S. 925. Petitioner suggests that the two-witness rule may have been relaxed under §1623 but maintained under §1621 because of the inherent protections of a proceeding before or ancillary to a U. S. Court or grand jury. Many of the less formal proceedings covered by §1621 don't carry the same indicia of reliability or truthworthiness. See Rule 804(b)(2), Federal Rules of Evidence.

Respondent further contends that any affidavit "prepared for use in connection with a court proceeding" is covered by §1623 and argues that Dunn "actively participated" in such preparation by testifying at the October 21 hearing. (Brief for the United States, p. 14). Petitioner submits that Dunn's actions at the October 21st hearing are not at issue since that event was not charged in the indictment as being an ancillary proceeding in which inconsistent declarations were made. The September 30 Canges

affidavit, by itself, must qualify as an ancillary proceeding under §1623 or the conviction must be set aside. The indictment charged inconsistent declarations before a grand jury on June 16, 1976, and in a proceeding ancillary to Musgrave on September 30, 1976 (A. 3-11). The declarations alleged to be inconsistent were drawn from only those two proceedings. The October 21, 1976, proceeding was not pled in the indictment, was not provided to the defense in advance of trial under Rule 16 and was not even contemplated as evidence in the government's case-in-chief.[5]

Respondent, in effect, justifies sustaining petitioner's conviction by adopting a process similar to that utilized by the appellate court and criticized by Respondent.

"We disagree with the court of appeals that petitioner's conviction can be affirmed if the Court concludes that the September 30 statement was not made in a proceeding ancillary to a court. Yet while we agree with petitioner that the conviction cannot be sustained on the ground set out by

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[5]MR. NOTTINGHAM: Your Honor, as to the first issue of Rule 16, Mr. Sears is perfectly correct, he didn't receive this transcript until today. I had not intended to introduce this as part of the Government's case in chief. However, I did not anticipate that the Court would permit Mr. Sears to cross-examine Mr. Snow to the extent it did, to the effect of establishing that Mr. Dunn's testimony before the grand jury was in fact true. That is to rebut that inference or to deal with that inference, is the reason that I am offering this transcript.

Mr. Dunn in the course of this transcript adopts his statements before Mr. Canges, and once again reaffirms that his testimony before the grand jury was untrue. (R. Vol. II, p. 82-83).

the court of appeals, we reach that conclusion by a different route." (Emphasis added.) (Brief for the United States, p. 27).

Later in its brief, Respondent argued:

"Thus, while the court of appeals' affirmance of petitioner's conviction on that theory does not constitute an amendment of the indictment or a variance in the proof, it does offend the principle that an appellate court cannot affirm a defendant's conviction on charges of which the jury did not find him guilty." (Citations omitted; Emphasis added.) (Brief for the United States, p. 34).

Respondent projects that should Dunn succeed in the instant appeal, he will "be subject to reindictment for making inconsistent statements before the grand jury and at the October 21 hearing." (Brief for the United States, p. 36). In a footnote, it appears that Respondent would proceed on an inconsistent declarations theory based on the grand jury testimony and the October 21 affirmance of the Canges affidavit. Respondent seems to suggest that the September 30 statements "became" declarations in proceedings before a court only after Dunn took the stand October 21. This was also inferred at pages 26, 33, 34 and 35 of Respondent's brief. Petitioner submits that such arguments are incongruous with Respondent's contention that the Canges statement, by itself, was an "ancillary proceeding."

The legislative history reflects that §1623 was intended to "facilitate Federal perjury prosecutions and

establishes a new false declarations provision applicable in Federal grand jury and court proceedings." U. S. Code Cong. and Adm. News, 91st Cong., 2nd Sess. 1970, Vol. 2, p. 4008. Petitioner submits that §1623 must be strictly construed. Bronston v. United States, 409 U.S. 352, 360 (1973). The Canges statement of September 30, 1976, cannot be deemed to fall within the definition of an ancillary proceeding under §1623. As the prosecuting attorney characterized it at trial " . . . [I]t was a private party entirely, entirely a private proceeding . . ." (R. Vol. II, p. 37).

ARGUMENT

II

A RULING THAT A WITNESS' IMMUNIZED TESTIMONY CANNOT BE USED AGAINST HIM IN AN INCONSISTENT DECLARATIONS PROSECUTION DOES NOT PROTECT HIM FROM PUNISHMENT FOR FUTURE CRIMES.

18 U.S.C. §6002 displaces the witness' privilege against self-incrimination and "protects against the use of compelled testimony directly or indirectly against the witness, in a criminal proceeding." (Emphasis added.) U. S. Code Cong. and Adm. News, 91st Cong., 2nd Sess., 1970, Vol. 2, p. 4008. Robert Dunn's testimony was used directly against him in a criminal proceeding without a showing that he violated his immunity order.

Respondent correctly observes that to sustain this conviction, "it is necessary to conclude that Dunn's immunized grand jury testimony could be used against him even if it

was truthful." (Emphasis added.) (Brief for the United States, p. 41).

A. Petitioner seeks no broader application of his immunity grant than the Fifth Amendment privilege which it displaced.

When Dunn appeared before the federal grand jury on June 16, 1976, and claimed his privilege against self-incrimination, he was subsequently compelled to testify with the promise that "no testimony or other information compelled under this order (or any information directly or indirectly derived from such testimony or other information) may be used against the witness ROBERT DWIGHT DUNN in any criminal case, in any court, except a prosecution for perjury, giving a false statement, or otherwise failing to comply with this order." (Emphasis added.) (A. 24).

The question is not whether petitioner is protected from prosecution for future crimes, but whether §1623(c) falls under the perjury or false statement exception to the immunity grant.

Dunn's testimony was compelled when his Fifth Amendment privilege was ordered displaced. The immunity grant is as broad as the privilege. The exclusionary rule leaves the witness in substantially the same position as if he had remained silent. Murphy v. Waterfront Comm'n, 378 U.S. 52, 79 (1964). Applied to the facts of the present case, unless Dunn violated the immunity order, the government was left with only the Canges statement and the October 21st testimony as evidence for use against him in its inconsistent

declarations prosecution. Upon Dunn's invocation of his Fifth Amendment privilege, the government had no testimony available for use against him unless it could except it from the immunity order. In United States v. Frumento, 552 F.2d 534, 542-543 (3rd Cir. 1977) the Court opined that it could not be used even for impeachment purposes.

> "Were we to permit impeachment with immunized testimony, we would then be affording the immunized witness something less than his full Fifth Amendment protection.
>
> * * *
>
> We reiterate our adherence to this principle; except as the basis for a prosecution for perjury a witness's immunized testimony may not be used against him." (Emphasis added.) United States v. Frumento at 552 F.2d 543.

The corpus delicti of the §1623(c) prosecution charged in the indictment was the June 16, 1976, grand jury testimony and the September 30, 1976, Canges statement. Unless the federal grand jury testimony was excepted from the immunity order, it was not available for use by the government against Dunn. To except the grand jury testimony from the ordered immunity, the government had to prove that Dunn committed perjury, gave a false statement or otherwise failed to comply with the order (e.g., contempt). (A. 24). If Dunn testified truthfully under immunity, then it cannot be said he committed perjury, gave a false statement or "otherwise failed to comply" with the order. Because he subsequently went to an attorney's office (one not representing his interests) and made inconsistent statements

did not lift the immunity unless the government proved that he breached his immunity bargain. Dunn asks for no more than he was promised and constitutionally guaranteed.

B. Dunn is not protected from prosecution for future crimes.

Dunn's grand jury testimony was not the corpus delicti of a future crime. It was part of the corpus delicti of a criminal case arising from his immunized testimony. The immunity would not have protected Dunn from a perjury prosecution under §1621 or §1623(a) if the government had proved that he lied to the grand jury. This is not because it constitutes the commission of a future crime; it is because perjury or false statement is an exception to the ordered immunity. Furthermore, it would not have protected him from a perjury prosecution had the government proved that he lied in U. S. District Court on October 21, 1976. The government, however, did not attempt to establish either. It chose, instead, the easier route of dispensing with the two-witness rule and proceeding on an inconsistent declarations theory under §1623(c). United States v. Diggs, 560 F.2d 266 (7th Cir. 1977) cert. den. 434 U.S. 925. Mere inconsistency does not prove perjury under immunity. Cameron v. United States, 231 U.S. 710 (1914).

Respondent argues that the Fifth Amendment does not protect a witness from prosecution for future crimes. Petitioner does not disagree. But the promise that he will not have evidence pried from his lips only to be used by the government to convict him must be honored. Murphy

v. Waterfront Comm'n, 378 U.S. 52, 55 (1964).

Dunn's risks of self-incrimination on June 16, 1976, were real, not imaginary, when he claimed his privilege against self-incrimination. See United States v. Marchetti, 390 U.S. 39 (1968). He testified, inter alia, that he was involved in illicit speed traffic when he met Phillip Musgrave (A. 26); that Musgrave had drugs in the penitentiary all the time; that he acted as Musgrave's gopher with compensation to be paid in drugs (A. 27); that he helped Musgrave smuggle drugs into the penitentiary (A. 27-29) and that he and Musgrave discussed "how he was going to set up the organization once he got outside." (A. 29).

If Respondent's argument that Dunn, or any other witness similarly situated, is not protected from having his immunized testimony used against him in the prosecution of future crimes, very few witnesses will testify with the assurance that their testimony won't be used against them. See United States v. Frumento, 552 F.2d 534, 542 (3rd Cir. 1977). For example, when Dunn testified about discussing with Musgrave "how he was going to set up the organization once he got outside," such testimony did not immunize Dunn from prosecution for any illegal drug offenses committed in assisting Musgrave set up an organization if it could be proved by independent evidence. What the immunity did confer, however, was the court's assurance that Dunn's testimony would not provide the link in the chain of evidence that might be used to convict Dunn of illegal

activities. "Immunity from the use of compelled testimony, as well as evidence derived directly or indirectly therefrom, affords this protection." (Emphasis added; Kastigar v. United States, 406 U.S. at 453).

Respondent argues that one of the main purposes for enactment of §1623 was to "ensure that immunized testimony would be truthful." (Brief for the United States, p. 65). Yet it argues that immunized testimony should be used against a witness even if truthful to prosecute future crimes. (Brief for the United States, p. 41).

By the government's reasoning, if a witness is called before the grand jury in a misapplication of government funds investigation against a fellow employee, claims his Fifth Amendment privilege on the basis of his own possible culpability (e.g., accessory after the fact, 18 U.S.C. §3) but is compelled to testify under 18 U.S.C. §6002, he will be forever exposed to the use of his compelled testimony against him for anything he does in the future. For example, if he gave the grand jury an account of his own financial situation and a couple weeks later swore to a financial statement at a bank that proved inconsistent, the government could use his compelled grand jury testimony against him to make out a violation under 18 U.S.C. §1014. Petitioner submits that the promise of use immunity is and must be just that--immunity from "use" against the witness in any criminal case except the specified exceptions--perjury, false statement or otherwise violating the order (e.g., contempt).

> "And if immunity that deprived him of that privilege is to be, as constitutionally it must, co-extensive with the privilege itself, his compelled admission of wrongdoing cannot later be used to discredit his effort to defend himself against a charge of some other wrongdoing. 'Immunity from the use of compelled testimony . . . prohibits the prosecutorial authorities from using the compelled testimony in any respect . . .' Powell, J., in Kastigar v. United States, supra, 406 U.S. at 453, 92 S.Ct. at 1661." United States v. Hockenberry, 474 F.2d at 250.

The government's concern for compelled "truthful" testimony can be realized only if a witness knows he or she is protected by the immunity. The immunity order is meant to compel truthful testimony and information "at any proceeding before or ancillary to a court . . . or a grand jury of the United States . . ." 18 U.S.C. §6003. It cannot compel a witness to be truthful for the remainder of his life only to be confronted with the possible inconsistencies should he subsequently falter. United States v. Hockenberry, 474 F.2d 247, 250 (3rd Cir. 1973). See also United States v. Frumento, supra, at 542-543. If the witness lies in proceedings other than those covered by the immunity order, the perjury [18 U.S.C. §§1621 or 1623(a)] must be proved by independent evidence. See United States v. Housand, 550 F.2d 818, 823 (2nd Cir. 1977) cert. den. 431 U.S. 970.

In United States v. Anzalone, 555 F.2d 317 (2nd Cir. 1977) cert. den. 434 U.S. 1015, the Second Circuit held that the bringing of an indictment which sets out false declarations given while under immunity takes those statements

outside the immunity grant and a verdict of guilty establishes that the "declarations were false and, hence, outside the immunity conferred." (Emphasis added.) Anzalone at p. 320. In the present case, the government in its indictment elected to prove inconsistency rather than false declarations while under immunity and, therefore, did not establish that the grand jury testimony was outside the immunity. The petit jury, by its verdict, also did not decide that false declarations were made while under immunity and therefore, did not bring them within the exception to §6002.

Respondent cites People v. Woodson, 309 Mich. 391, 15 N.W.2d 679 (1944) as similar to the case at bar. The court in Woodson held that immunized testimony could be used to prove the falsity of testimony in a later case. However, in Woodson the government was attempting to prove the perjury committed at a time subsequent to the immunized testimony and was not relying on the immunized testimony as part of the corpus delicti of the offense. Petitioner contends that the court's ruling is further distinguishable in that the immunity given Woodson (transactional) protected him from prosecution on any past or present, but not future, substantive offenses about which he testified. Dunn, on the other hand, was promised that his testimony would not be used against him "in any criminal case, in any court, except a prosecution for perjury, giving a false statement, or otherwise failing to comply with the order." (A. 24). 18 U.S.C. §6002. Under the opinions rendered

in several federal cases, any testimony compelled under use immunity could not be used for any purpose except a prosecution for perjury, false statement or other violation of the immunity order. See for e.g., Cameron v. United States, supra; United States v. Berardelli, supra; United States v. Frumento, supra; United States v. Housand, supra. Truthful immunized testimony cannot be used by the government in contravention of the ordered immunity. Cameron v. United States, 231 U.S. 710 (1914); United States v. Hockenberry, 474 F.2d 247 (3rd Cir. 1973).

Respondent argued that this Court's decision in Cameron v. United States, 231 U.S. 710 (1914) is not contrary to its stated position (Footnote, Brief for the United States, p. 50). Petitioner disagrees.

The statute involved in Cameron reads quite similarly to the use immunity provision at issue in the present case:

> "No pleading of a party, nor any discovery or evidence obtained from a party or witness by means of a judicial proceeding in this or any foreign country, shall be given in evidence, or in any manner used against him or his property or estate, in any Court of the United States, in any criminal proceeding or for the enforcement of any penalty or forfeiture. Provided, that this section shall not exempt any party or witness from prosecution and punishment for perjury committed in discovering or testifying as aforesaid." (Emphasis added.)

A comparative analysis of 18 U.S.C. §6002 reveals many similarities in language. In Cameron, this Court held that since the government did not use the immunized testimony

to prove perjury but merely to contradict the testimony given before the referee, its use violated the immunity statute. The court stated:

> "We think to permit the use of the testimony for that purpose was to permit the testimony given in the one instance to be used in a criminal proceeding based upon testimony given in the other instance, and therefore to violate the immunity given in §860 of the Revised Statutes, then in force." Cameron at p. 724.

Though §1623(c) was not in effect at the time of the Cameron decision, the government's method of prosecuting perjury by establishing inconsistency of statements was not much different.

Where a witness testifies truthfully under immunity in one proceeding, petitioner contends that the government cannot use it to obtain a conviction for perjury in another proceeding.

> "A witness' truthful testimony, given under a grant of immunity, may not be used to prove either a later perjury, Cameron v. United States, 231 U.S. 710-718-24, 34 S.Ct. 244, 58 L.Ed. 448 (1914), or, as here, an earlier perjury, United States v. Alter, 482 F.2d 1016, 1028 (9th Cir. 1973)." United States v. Berardelli, 565 F.2d 24, 28 (2nd Cir. 1977).

See United States v. Anzalone, 555 F.2d 317, 320 (2nd Cir. 1977) cert. den. 434 U.S. 1015; United States v. Hockenberry, 474 F.2d 247 (3rd Cir. 1973). This court, however, need not go that far in determining that immunized testimony cannot be used to establish the corpus delicti of an inconsistent declarations prosecution. United States v. Berardelli, supra; United States v. Housand, supra; United States v.

Patrick, supra. Petitioner submits that Respondent's past offense-future offense distinction is inapplicable to §1623(c) since a part of the corpus delicti in the present case was the declarations made under immunity. Unless those statements were shown to be untruthful, they were not removed from immunity protection.

Respondent argues that Petitioner must "overcome the manifest intent of Congress that the immunity statute should not be construed to restrict any use of immunized testimony that is permissible under the Constitution. . ." (Emphasis added; Brief for the United States, p. 64). Petitioner submits that the government's use of Dunn's immunized testimony against him in a criminal case without showing that he committed perjury or made a false statement was not "permissible under the Constitution." Again, the legislative history to Title II, the immunity provisions, reveals that Congress expected that a witness' Fifth Amendment privilege must remain unabridged.

> "It is contemplated that the title will enable effective displacement of the privilege against self-incrimination by granting protection coextensive with the privilege; that is, protection against the use of compelled testimony directly or indirectly against the witness, in a criminal proceeding." (Emphasis added.) U. S. Code Cong. and Adm. News, 91st Cong., 2nd Sess. 1970, Vol. 2, p. 4008.

Petitioner submits that §1623(c) can be reconciled with the Fifth Amendment and the use immunity provisions by holding that immunized testimony cannot be used in any respect except a prosecution for perjury, false statement or other

violations of the immunity order. Kastigar at p. 453. An immunized statement not shown to be untruthful simply will not qualify without violating §6002 and the witness' Fifth Amendment privilege. A statute should be construed so as to avoid a serious question about its constitutionality. See Lynch v. Overholser, 369 U.S. 705, 711 (1962); Int'l Assn. of Machinists v. Street, 367 U.S. 740, 749 (1961).

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted,

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